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In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1094

RUSSELL HAROLD SITTON AND BARBARA SITTON,
Petitioners,

v.

UNITED STATES OF AMERICA, ET AL,
Respondents.

Answer to Motion to Defer Certiorari and Refer Case to the Fifth Circuit for Additional Findings

ANSWER TO PETITION FOR WRIT OF CERTIORARI

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ANSWER TO PETITION FOR WRIT OF CERTIORARI

The Respondents, American Title Company of Dallas, Katherine H. Brown and husband Jarvis Brown, Leonard Duckworth, Leonard C. Duckworth Agency, Harry Clifton Summer, Jr., Mr. and Mrs. Walter J. Moorman, American Insurance Company, Trinity Universal Insurance Company, and Lawyers Surety Corporation would respectfully show unto the Court that the Motion to Defer Certiorari and Refer Case to the Fifth Circuit for Additional Findings should be in all things overruled and further that the Petition for Writ of Certiorari in the above cause should be denied.

ANSWER TO MOTION TO DEFER CERTIORARI AND REFER CASE TO THE FIFTH CIRCUIT FOR ADDITIONAL FINDINGS

The Respondents named hereinabove submit that Petitioners' Motion to Refer the Case to the Fifth Circuit for Additional Findings is without merit and is without substantiation in the rules or law.

Petitioners request this Court to return the case to the lower court for an examination of the facts. The cases Petitioners cite at page 5 of their Motion are not in point and are clearly distinguishable in their holdings from the relief requested by Petitioners herein. Likewise, the citation to Stern & Gressman, Supreme Court Practice, at page 26 is quoted out of context and not in point.

Therefore, Petitioners' Motion should be in all things overruled.

COUNTERPOINTS TO QUESTIONS PRESENTED BY PETITIONERS

COUNTERPOINT ONE
(Replying to Petitioners' Question One)

Petitioners' Question One presents no question for adjudication within the jurisdiction of this Court.

COUNTERPOINT TWO
(Replying to Petitioners' Question Two)

Petitioners, in Question Two, raise no question within the jurisdiction of this Court, in that the Courts below did not hold that where the United States is a party to a case in the federal court and one of the parties invokes the previous judgment of a state court that the federal

court is without jurisdiction to hear a claim that the state court proceedings violate the Seventh and Fourteenth Amendments.

COUNTERPOINT THREE

(Replying to Petitioners' Question Three)

Petitioners' Question Three presents no question for adjudication within the jurisdiction of this Court.

COUNTERPOINT FOUR

(Replying to Petitioners' Question Three)

The due process clause of the Fourteenth Amendment does not require that the sovereign states observe the second clause of the Seventh Amendment to the United States Constitution.

COUNTERPOINT FIVE

(Replying to Petitioners' Question Three)

In the alternative, if the due process clause of the Fourteenth Amendment does require that the sovereign states observe the second clause of the Seventh Amendment, such clause was observed and the rights guaranteed thereunder were extended in the State Court.

COUNTERPOINT SIX

(Replying to Petitioners' Question Four)

Petitioners raise no constitutional question in their Question Number Four, in that such question inquires only whether the evidence in the cause in the State Court raises a fact issue.

COUNTERPOINT SEVEN

(Replying to Petitioners' Question Five)

Petitioners do not raise any question within the jurisdiction of this Court by virtue of their Question Number Five, in that such question simply requests the Court to search the record in the State Court to see whether there was an absence of evidence to support the jury verdict, and if so, whether the ruling of the Court denies Petitioners due process and equal protection of the laws.

COUNTERPOINT EIGHT

(Replying to Petitioners' Question Six)

Petitioners, in their Question Number Six, raise no question within the jurisdiction of this Court, in that the Texas Court of Civil Appeals did not hold that a veteran who elected not to invoice the hardship provision of 38 U.S.C. 1820 (a) (4) was barred from seeking relief from third parties, and the construction of such statute was not necessary to a decision in the cause.

COUNTERPOINT NINE

(Replying to Petitioners' Question Eight)

Petitioners' Question Number Eight presents no question for adjudication within the jurisdiction of this Court, in that the Court of Appeals did not pass on the question of limitations and no error is shown.

STATEMENT OF THE CASE

The original suit in the United States District Court was instituted by the Respondent United States of America against Petitioners for the recovery of a deficiency resulting from the foreclosure of a mortgage guaranteed by the Vet-

erans Administration. Petitioners then instituted a third party complaint against these Respondents as third party defendants. Petitioners alleged in this third party complaint that Respondents Duckworth, Summer, Katherine Brown and Walter Moorman conspired together to alter a warranty deed to substitute a grantee in said deed in order to remove Respondent Moorman as an assumptor of a mortgage. Petitioners further alleged that as a result of this alleged conspiracy they sustained actual and exemplary damages totalling $90,000.00.

Petitioners further alleged that the exact same cause of action as alleged in the third party complaint had been previously alleged and tried in a State District Court to a jury. The result of this trial in the State District Court was that said Court entered a judgment on January 21, 1965, decreeing that Petitioners take nothing by this cause of action against these Respondents. Petitioners then appealed the State District Court judgment to the applicable Court of Appeals for the State of Texas. The Texas Court of Appeals affirmed the State District Court judgment. Petitioners sued out a writ of error to the Supreme Court of the State of Texas, which court refused to grant Petitioners' application for writ of error.

Thereafter, Respondents applied for a Writ of Certiorari to this Honorable Court, which was denied.

In the third party complaint filed with the Federal District Court, Petitioners prayed for relief on two principal grounds. The first, that the Federal District Court should

"render such judgment against third party defendants as the State Court should have rendered"; and second, in the alternative that the Federal District Court should conduct a plenary trial and render judgment for Petitioners for the claimed actual and exemplary damages.

Respondents denied the allegations of the third party complaint, and pleaded the specific affirmative defenses of estoppel by judgment, res judicata, and the Texas two year statute of limitations. These defenses as to the cause of action pleaded by Petitioners and their prayer for a plenary trial on the merits. As to Petitioners pleading and prayer for the Federal District Court to render such judgment as the State Court should have rendered, Respondents filed their Motion to Dismiss for Lack of Jurisdiction.

Thereafter, all parties to the pending litigation filed Motions for Summary Judgment. Upon hearing, the Federal District Court entered its judgment sustaining the Motion of the United States for deficiency; further, its judgment overruling the motion for summary judgment of Petitioners; and its judgment that these Respondents' Motion to Dismiss for Lack of Jurisdiction be sustained as to Petitioners' prayer for the District Court to render the judgment that the State Court should have rendered, and that Respondents' Motion for Summary Judgment be sustained as to Petitioners' pleading and prayer for a plenary trial on the merits.

On appeal, the Court of Appeals for the Fifth Circuit affirmed the judgment of the trial court.

COUNTERPOINT ONE — (Restated)

Petitioners' Question One presents no question for adjudication within the jurisdiction of this Court.

STATEMENT, ARGUMENT AND AUTHORITIES UNDER COUNTERPOINT ONE

Question One as put by Petitioners must be answered in the negative and it affords no ground for granting the Writ of Certiorari. Petitioners raised the alleged federal questions at the first opportunity during the proceedings in the State Courts. They were denied at all levels of appeal during the proceedings. The claims Petitioners alleged in the Federal District Court were the same as in the state court litigation, which Petitioners concede in their application for Writ of Certiorari. Petitioners had full opportunity to be heard and were heard with respect to their claim of denial of due process. The Federal District Court was correct in applying the doctrine of res judicata. This, even though the state court judgment might be erroneous. *Rooker v. Fidelity Trust;* 263 U.S. 412 (1923); *Baltimore S. S. Co. v. Phillips,* 274 U.S. 316 (1927); and *Angel v. Bullington,* 330 U.S. 183 (1946). The Petitioners asserted their alleged rights in the state courts through the highest tribunal available to them, including this Honorable Court. They were unsuccessful. They cannot begin all over again in an action involving the same issues before another forum in the same state. *Angel v. Bullington, supra.*

COUNTERPOINT TWO — (Restated)

Petitioners, in Question Two, raise no question within the jurisdiction of this Court, in that the Courts below did not hold that where the United States is a party to a case in the federal court and one of the parties invokes the previous judgment of a state court that the federal court is without jurisdiction to hear a claim that the state court proceedings violate the Seventh and Fourteenth Amendments.

STATEMENT, ARGUMENT AND AUTHORITIES UNDER COUNTERPOINT TWO

It is the position of these Respondents that Petitioners misconstrue the basic nature of the "jurisdiction" of the Federal District Court. It is true that 28 U.S.C. 1345 provides that the district court has original jurisdiction of all civil actions where the United States is a party. Only by construction is this section held to confer jurisdiction over a cross claim ancillary to the principal claim. *United States v. Manufacturers Hanover Trust Co.* (D.C. N.Y. 1964) 231 Fed. Supp. 160. The district court, by this construction, may acquire jurisdiction over the person of the Respondents (as third party defendants); but the court must then look to the pleadings to determine whether or not a justiciable controversy is presented. *Resolute Insurance Co. v. State of North Carolina,* (4th Cir., 1968) 397 F. 2d 586.

Upon resort to the pleadings of Petitioners in their third party complaint, their argument fails upon two separate grounds. Petitioners pleaded a cause of action that had

previously been litigated in the state courts, the outcome of which was adverse to Petitioners. They asked the district court to "render such judgment against third party defendants (Respondents herein) as the state court should have rendered." This complaint and prayer constitutes nothing more than a request for appellate review.

Cases of this nature have been before the federal courts many times. They have been uniformly dismissed for lack of jurisdiction. The leading case is *Rooker v. Fidelity Trust Co.* 263 U.S. 412 (1923). This opinion holds that a district court does not have jurisdiction of a case that has been previously litigated in a state court. It points out that a district court does not have appellate jurisdiction and cannot entertain such a case even if the constitutional irregularities alleged to exist did in fact exist. See also *Williams v. Tooke,* (5th Cir., 1940) 108 F. 2d 758; *Patterson v. City of Newport News, Va.,* (4th Cir., 1966) 364 F. 2d 816; and *Resolute Insurance Co. v. State of North Carolina,* supra.

The second ground involved is Petitioners' pleading and prayer for a plenary trial on the merits. This pleading and prayer is subject to the plea of res judicata raised by Respondents. Petitioners concede the cause of action and the parties to be the same as in the state court proceeding. Under the state of the record, the district court was correct in applying res judicata as a bar to Petitioners' pleading and prayer for a plenary trial.

Petitioners complain that the district court dismissed the cause for want of federal jurisdiction. It is submitted that

this is a misconstruction of the judgment entered by the court with respect to the entire action as it existed. The district court granted a summary judgment to the United States against Petitioners as to the merits of the cause of action of the government against Petitioners. The district court dismissed the complaint of Petitioners against the Respondents insofar as the same prayed for appellate review by the district court; and the district court granted Respondents a take nothing judgment as to Petitioners' pleading and prayer for a plenary trial upon the ground of res judicata, as raised by Respondents in their answers and Motions for Summary Judgment.

The question does not afford a reason for granting the writ.

COUNTERPOINTS THREE, FOUR AND FIVE — (Restated)

COUNTERPOINT THREE — (Restated)

Petitioners' Question Three presents no question for adjudication within the jurisdiction of this Court.

COUNTERPOINT FOUR — (Restated)

The due process clause of the Fourteenth Amendment does not require that the sovereign states observe the second clause of the Seventh Amendment to the United States Constitution.

COUNTERPOINT FIVE — (Restated)

In the alternative, if the due process clause of the Fourteenth Amendment does require that the sovereign states

observe the second clause of the Seventh Amendment, such clause was observed and the rights guaranteed thereunder were extended in the State Court.

STATEMENT, ARGUMENT AND AUTHORITIES UNDER COUNTERPOINTS THREE, FOUR AND FIVE

Petitioner presents no issue in Question Three or the argument thereunder within the jurisdiction of this Honorable Court. Question Three, as presented, is merely a rhetorical statement; it amounts only to a request for an advisory opinion. Petitioner makes no showing that this Court's answer to Question Three would either grant or deny them relief, for they make no showing that even if the Second Clause of the Seventh Amendment does apply to the state courts, the rights guaranteed thereunder were not extended to Petitioners. Petitioners make no showing or argument that they did not receive a trial by jury in accordance with the stipulations of the Seventh Amendment to the United States Constitution.

Your Respondents would show, however, that the Second Clause of the Seventh Amendment does not apply to proceedings in state courts. Petitioners cite numerous cases holding that the First Clause of the Seventh Amendment does not apply to the states through the due process clause of the Fourteenth Amendment. Most of the cases cited by Petitioners hold either directly or by necessary implication, that the Second Clause of the Seventh Amendment does not apply to the states either. Because it is not mandatory for the states to provide trial by jury in civil cases, it must be held that if a state does provide trial by jury, it may

also provide reasonable rules governing the process and procedure of such trial. The cases upholding this point are legion. See, for example *Fay v. People of New York*, 332 U.S. 261 (1947). In that case, this Court stated:

> "(I)t steadily has been ruled that the commandments of the Sixth and Seventh Amendments would require jury trial in criminal and certain civil cases are not picked up by the due process clause of the Fourteenth so as to become limitations on the states. 'This Court has ruled that consistently with those amendments, trial by jury may be modified by a state or abolished altogether.' *Palko v. State of Connecticut*, 302 U.S. 319 and cases there cited."

Conceivably, the trial process provided by a state court could violate due process of law. Such is not the circumstance as exists with the state court in this instance, nor is it the proposition raised by Petitioners. Petitioners would have this Court hold that all judgments non obstante veredicto are ab initio unconstitutional.

Such a holding would require the Courts and legislatures of every state in the union to alter their rules of judicial procedure. Moreover, such a holding would violate Rule 50b of the Federal Rules of Civil Procedure. Rule 301 of the Texas Rules of Civil Procedure is similar to Rule 50b of the Federal Rules of Civil Procedure. Rule 301 provides that judgment non obstante veredicto may be granted only if a directed verdict would have been proper. This rule has been construed much the same as Rule 50b, in that judgment non obstante veredicto may be entered only when,

for the facts, there is no evidence of probative force in favor of the judgment. Under Rule 301, judgment non obstante veredicto may be entered only when, from the evidence, reasonable minds could not differ on the result. That rule was observed and followed by the state court in the case. The state trial judge, the Honorable Court of Appeals for the Fifth Judicial District of Texas, and the Honorable Supreme Court of Texas, by its refusal to hear Petitioners' Writ of Error, have held that there was no evidence to support the verdict that was rendered upon the trial of this cause in the state court. The Petitioners produced no evidence of any probative force to sustain the allegation of their petition.

COUNTERPOINTS SIX AND SEVEN — (Restated)

COUNTERPOINT SIX — (Restated)

Petitioners raise no constitutional question in their Question Number Four, in that such question inquires only whether the evidence in the cause in the State Court raises a fact issue.

COUNTERPOINT SEVEN — (Restated)

Petitioners do not raise any question within the jurisdiction of this Court by virtue of their Question Number Five, in that such question simply requests the Court to search the record in the State Court to see whether there was an absence of evidence to support the jury verdict, and if so, whether the ruling of the Court denies Petitioners due process and equal protection of the laws.

STATEMENT, ARGUMENT AND AUTHORITIES UNDER COUNTERPOINTS SIX AND SEVEN

Petitioners' Questions Four and Five simply ask the Court to weigh the evidence in this case. It has been held in the following cases that a Writ of Certiorari will not be granted to review evidence: *General Talking Pictures Corp. v. Western Electric Company*, 304 U.S. 175 (1938), 305 U.S. 124 (1938); *U. S. v. Johnston*, 268 U.S. 220 (1925). Thus, this Honorable Court would not grant a Writ of Certiorari to review a decree on the ground that the evidence was not sufficient to establish actual dedication of Petitioners' property to public use. *Southern Power Company v. North Carolina Public Service Company*, 263 U.S. 508 (1924).

While this Court can review a decision of a state court on a question pertaining to evidence where a federal question is otherwise involved, it does not have jurisdiction to determine sufficiency of evidence absent the federal question. *Whitney v. People of State of California*, 274 U.S. 357 (1927), *Van Oster v. State of Kansas*, 272 U.S. 465 (1926).

Where the lower court has found that there was no evidence on a certain issue, the rule is that if, in fact, there is no such evidence, or if the evidence is conflicting, the Supreme Court of the United States can inquire no further. Only if the uncontroverted evidence affirmatively establishes the facts contrary to the finding can this Court ignore that finding. *Baltimore and O.S.W.R. Co. v. Burtch*, 263 U.S. 540, (1924).

COUNTERPOINT EIGHT — (Restated)

Petitioners, in their Question Number Six, raise no question within the jurisdiction of this Court, in that the Texas Court of Civil Appeals did not hold that a veteran who elected not to invoice the hardship provision of 38 U.S.C. 1820 (a) (4) was barred from seeking relief from third parties, and the construction of such statute was not necessary to a decision in the cause.

STATEMENT, ARGUMENT AND AUTHORITIES UNDER COUNTERPOINT EIGHT

The Texas Court of Civil Appeals did not hold that a failure to seek relief under the hardship provisions of the applicable statute barred a veteran from seeking relief from third parties. The Court, in referring to the letters from the Veteran's Administration concerning a waiver of Petitioners' indebtedness was dealing with the question of causation. The Petitioners, having alleged that their injuries flowed from the act of the alteration of the deed, the Court of Civil Appeals was simply pointing out that the harassment which had occurred by the Veteran's Administration might not have occurred had Petitioners sought the remedy available to them. So the Court said, "Under these circumstances can the Appellants' injuries properly be said to have 'naturally flowed' from the alteration of the deed? Were they 'directly or immediately caused by the wrongful act'? We think each of these questions must be answered in the negative."

Thus, there was no holding that failure to apply for relief to the Veteran's Administration barred an action against

the third party. All the Court was saying was that in proving causation Petitioners had to show that the alleged injuries sustained by them were direct and immediate consequences of the act of the Respondents. And the Court was pointing out that the chain of causation was broken. Consequently, a construction of the statute in question was not necessary to a decision in the cause.

COUNTERPOINT NINE — (Restated)

Petitioners' Question Number Eight presents no question for adjudication within the jurisdiction of this Court, in that the Court of Appeals did not pass on the question of limitations and no error is shown.

STATEMENT, ARGUMENT AND AUTHORITIES UNDER COUNTERPOINT NINE

A careful reading of the opinion by the Court of Appeals reveals that it made no holding with regard to Respondents' plea of the statute of limitations. Petitioners concede that this is so (page 46, Petition for Writ of Certiorari). Such being the case, no harm or error is shown, there is nothing under this question for this Court to consider.

These Respondents have not answered or argued Petitioners' Question Seven as the same pertains only to the main action between the United States and Petitioners.

CONCLUSION

WHEREFORE, these Respondents respectfully pray that the Petition for Writ of Certiorari be denied.

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